Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-912

EDWARD V. HANRAHAN; RICHARD S. JALOVEC; DANIEL GROTH; RAYMOND BRODERICK; EDWARD CARMODY; JOHN CISZEWSKI; WILLIAM CORBETT; JAMES DAVIS; JOSEPH GORMAN; LYNWOOD HARRIS; ROBERT HUGHES; GEORGE JONES; PHILIP JOSEPH; WILLIAM KELLY; JOHN MARUSICH; JOHN MULCHRONE; HARRY ERVANIAN; JOHN MEADE; ROBERT KUKOWINSKI; and JOHN SADUNAS,

Petitioners,

vs.

IBERIA HAMPTON, Administratrix on behalf of the Estate of FRED A. HAMPTON, Deceased; FANNIE MAE CLARK, Administratrix on behalf of the Estate of MARK CLARK, Deceased; VERLINA BREWER; DEBORAH JOHNSON; RONALD SATCHEL; HAROLD BELL; BLAIR ANDERSON; BRENDA HARRIS; and LOUIS TRUELOCK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' SUPPLEMENTARY MEMORANDUM

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PETITIONERS' SUPPLEMENTARY MEMORANDUM

On December 11, 1979, Petitioners filed their Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (79-912), as did the Federal Defendants (79-914). The next day, December 12, 1979, the Seventh Circuit Court of Appeals issued an

order awarding appellate attorneys' fees of Ninety-Nine Thousand Nine Hundred and Ten Dollars ($99,910.00) against Defendants (Petitioners before this Court) having determined that Respondents were prevailing parties under 42 U.S.C. Sec. 1988. The Seventh Circuit also awarded costs of One Thousand Four Hundred Thirty-Two Dollars and Fifty Cents ($1,432.50) to the Plaintiffs. The total appellate fees so awarded Plaintiffs, Respondents herein, comes to One Hundred One Thousand Three Hundred Forty-Two Dollars and Fifty Cents ($101,342.50). This order is contained in Appendix J of the "Brief for Respondents Anderson, Bell, Clark, Satchel and Truelock In Opposition to Defendants' Petition for Writs of Certiorari."

On April 15, 1980, the Seventh Circuit Court of Appeals denied the motions filed by the State and Federal Defendants for rehearing and suggestions for rehearing *en banc* with respect to the awarding of appellate fees against the Defendants in favor of the Plaintiffs in the said amount of One Hundred One Thousand Three Hundred Forty-Two Dollars and Fifty Cents ($101,342.50).

Judge Pell in his dissent, *Hampton v. Hanrahan*, 600 Fd 600, 666 (1979), there had said he would allow attorneys' fees against only the shooter defendants. Subsequently, on April 15, 1980 Judge Pell changed his view and said,

> "I am now of the belief that my position was incorrect and that the appellants are not 'prevailing' parties within the meaning of Section 1988. It is true that they have prevailed thus far in the sense of keeping the litigation alive, but that is the only sense in which they are prevailing. They yet have to establish by a final judgment the merits issue of their claim that their civil rights have been violated." Appendix Page 2.

Judge Pell also said on April 15, 1980 that:

> "Because the position I have now reached after considerable reflection is a reversal of the position I have heretofore taken on the particular issue, I deem it necessary to review briefly some of the record matters in this complex litigation.
>
> The only references I am able to find in the original briefs filed by the appellants are two in the brief of the Anderson plaintiffs. One of these is the last in a listing of the issues presented for review and reads in its entirety as follows:
>
> XIII. The plaintiffs should be awarded costs and attorneys' fees for the trial and for this appeal."

The second reference in the original brief appears at page 181 of the brief, a section devoted to the *Federal Defendants*, and reads as follows:

"And finally, costs for the trial and the appeal, and attorneys' fees* should be assessed against *these Defendants.*

**Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972); *Stolberg v. Members of Board of Trustees*, 474 F.2d 485 (1st Cir. 1973); Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, effective October 19, 1976."

These fleeting references in a 247 page brief scarcely placed in focus the matter of fees as a serious issue and I am unable to find that it was even addressed in the briefs of the Defendants. The issue, however, was addressed in some greater length in the reply brief of the Anderson plaintiffs to which the defendants, of course, did not have a further op-

portunity of briefing a response." (Emphasis added). Appendix Page 2-3.*

The April 15, 1980 Order is set forth in the Appendix hereto.

Respectfully submitted,

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* Since the State Defendants were not given such an opportunity to brief a response, the State Defendants filed a motion to strike this new matter in the Anderson Plaintiff Reply Brief. The Seventh Circuit, however, took this motion under advisement and did not rule upon it; instead, the Seventh Circuit issued its opinion in *Hampton v. Hanrahan*, 600 F.2d 600 (1979) without giving the State Defendants an opportunity to brief a response.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 15, 1980

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

IBERIA HAMPTON, et al.,

Plaintiffs-Appellants,

Nos. 77-1698, et al. vs.

EDWARD HANRAHAN, et al.,

Defendants-Appellees.

On Petitions for Rehearing.

ORDER

On consideration of the motions filed by the state and federal defendants, respectively, for rehearing and suggestions for rehearing *en banc* of the order with respect to the award of attorney fees issued on December 12, 1979,

IT IS ORDERED that the penultimate paragraph on page 13 of that order be amended to read as follows:

> Plaintiffs' attorneys fail to suggest how the fees should be apportioned between defendants. We hold that one-third of the award should be paid by the federal defendants and two-thirds should be paid by the state defendants.

The remaining portion of that paragraph is deleted.

IT IS FURTHER ORDERED that the state defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* concerning attorney fees is hereby DENIED.

IT IS FURTHER ORDERED that the federal defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* is hereby DENIED.

It Is FURTHER ORDERED that the motion filed by the United States to intervene is hereby DENIED.

PELL, *Circuit Judge*, concurring.

Pursuant to 42 U.S.C. § 1988, and citing as case authority *Davis v. Murphy*, 487 F.2d 362 (7th Cir. 1978), the majority opinion in this case granted the request of the appellants for attorneys' fees for their appellate work. 600 F.2d at 643. In my dissenting opinion, I implicitly agreed that the appellants were entitled to fees for their appellate work but would have only allowed the fees commensurate with the work involving the shooter defendants. 600 F.2d at 666. My treatment of the matter of fees came at the end of a lengthy dissent and was included in a catchall section dealing with "Other contentions and issues." I now am of the belief that my position was incorrect and that the appellants are not "prevailing" parties within the meaning of section 1988. It is true that they have prevailed thus far in the sense of keeping the litigation alive, but that is the only sense in which they are prevailing. They yet have to establish by a final judgment the merits issue of their claim that their civil rights have been violated.

Because the position I have now reached after considerable reflection is a reversal of the position I have heretofore taken on the particular issue, I deem it necessary to review briefly some of the record matters in this complex litigation.

The only references I am able to find in the original briefs filed by the appellants are two in the brief of the Anderson plaintiffs. One of these is the last in a listing of the issues presented for review and reads in its entirety as follows:

> XIII. The plaintiffs should be awarded costs and attorneys' fees for the trial and for this appeal.

The second reference in the original brief appears at page 181 of the brief, a section devoted to the federal defendants, and reads as follows:

> And finally, costs for the trial and the appeal, and attorneys' fees* should be assessed against these Defendants.
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> **Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972); *Stolberg v. Members of Board of Trustees*, 474 F.2d 485 (1st Cir. 1973); Civil Rights Attorneys Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, effective October 19, 1976.

These fleeting references in a 247 page brief scarcely placed in focus the matter of fees as a serious issue and I am unable to find that it was even addressed in the briefs of the defendants. The issue, however, was addressed at some greater length in the reply brief of the Anderson plaintiffs to which the defendants, of course, did not have a further opportunity of briefing a response. In their reply brief these plaintiffs while conceding that they "may not technically be 'prevailing parties'," contended that an award of attorneys' fees would be consistent with the policy, spirit, and congressional intent underlying section 1988. In addition, the appellants cited a number of cases as reflecting a growing body of precedent supporting the interim award of attorneys' fees.

The propriety of granting fees for appellate work in a situation such as the present where the claiming party had not yet prevailed on the merits was put in sharp focus by the federal defendants' petition for rehearing and suggestion for rehearing in banc in which this was

one of only two issues raised. Specifically, these defendants contended that the cases on which the majority had relied were cases which disposed of the merits and that the principal case actually treating the issue, which was in the D.C. Circuit, had reached a contrary result. I agree with Judge Bazelon's analysis.

By an evenly divided vote, this court denied rehearing in banc which, as I see it, settled the issue insofar as this court was concerned, as the issue was squarely presented in the petition for rehearing. The petitions for rehearing presently pending before this court are in essence asking for reconsideration of an issue which has already been the subject of disposition. I do not read these petitions as essentially challenging the amount of the attorneys' fees but rather the propriety of any fees at all.

I am not unmindful that I joined in the order of this court of December 12, 1979, in which it was indicated that the court deemed that the plaintiffs had shown substantial success on the merits on appeal and that they were prevailing parties under section 1988. Upon further research and reflection, I am convinced that I was legally incorrect in thinking that there was a basis for the award of any fees at this time.

Notwithstanding this "confession of error" on my part, I cannot be unmindful that procedurally this court by denying in banc rehearing has rejected the position which I now believe to be correct and I have no reason for believing that the three judges who voted against the rehearing in banc did not give full consideration to the propriety issue which was set forth in the petition for rehearing and is now being readvanced. The issue is one which has been raised by the defendants in their petitions for certiorari before the Supreme Court. I reluctantly conclude that it is the Supreme Court to which the defendants must look for relief from the order for the payment of the attorneys' fees in question.

I therefore concur in the foregoing order, albeit reluctantly.